82-1129

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

NEW ORLEANS STEAMSHIP ASSOCIATION,

Petitioner

VERSUS

GEORGE WILLIAMS, ET AL

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Can an appellate court avoid the "clearly erroneous" standard of Rule 52, Fed. R. Civ. P., by characterizing as legal rather than factual a trial court's finding that the work performed by the complainant class could not be segmented for purposes of Title VII analysis?

2.(a) Can a reviewing court that reverses a trial court's finding because of what the reviewing court characterizes as a legal error then refuse to remand for factual determinations under the correct legal standard?

(b) Is the question of discriminatory intent in a Title VII disparate treatment case a question of fact to be decided by a trial court; and, if it is, can a Court of Appeals substitute itself as the fact finder on this critical issue?

3. Can unidentified individuals not named as party plaintiffs serve as adequate class representatives under Rule 23, Fed. R. Civ. P.?

PARTIES TO THE PROCEEDING

New Orleans Steamship Association
Atlantic and Gulf Stevedores, Inc.
Cooper Stevedoring of Louisiana, Inc.
Dixie Stevedores, Inc.
J.P. Florio and Co., Inc.
Gulf Stevedore Corporation
Louisiana Stevedores, Inc.
Lykes Bros. Steamship Co., Inc.
Mid-Gulf Stevedores, Inc.
New Orleans Stevedoring Company
Rogers Terminal and Shipping Corporation
Ryan-Walsh Stevedoring Co., Inc.
T. Smith & Son, Inc.
Southern Stevedoring Company
Strachan Shipping Company
United States Stevedore Corporation
J. Young & Company, Inc.
The International Longshore Association (I.L.A.)
General Longshore Workers, Local Union No. 3000 (I.L.A.)
Sacksewers, Sweepers, Waterboys and Coopers Union, Local Union No. 1802 (I.L.A.)
George James Williams
Duralph S. Hayes
Ernest W. Turner, Jr.
Mathew D. Richard
John T. Aaron

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Petitioner, New Orleans Steamship Association, respectfully petitions for a Writ of Certiorari to review the April 9, 1982 and the October 8, 1982 decisions of the United States Court of Appeals for the Fifth Circuit in the subject case.

OPINIONS BELOW

The April 9, 1982 opinion of the United States Court of Appeals for the Fifth Circuit in *Williams, et al v. New Orleans Steamship Association, et al,* No. 80-3886 is reported at 673 F.2d 742 (1982). Petition for Rehearing and Suggestion of En Banc Consideration on Rehearing was denied in an opinion reported at 688 F.2d 412 (1982). The opinion of the United States District Court for the Eastern District of Louisiana that was affirmed in part and reversed in part by the Court of Appeals is reported at 466 F.Supp. 662 (E.D. La. 1979).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) to review a decision dated April 9, 1982. Petition for Rehearing and Suggestion of En Banc Consideration on Rehearing were denied October 8, 1982.

STATEMENT OF THE CASE

History of the Litigation and Course of Proceedings.

This case, a broad, sweeping civil rights class action charging across-the-board race discrimination under 42 U.S.C. § 2000e, *et seq* and 42 U.S.C. § 1981, was filed more than ten years ago. Five named plaintiffs proceeded to trial in 1974 as individual claimants and as representatives of a class of several thousand longshoremen in the Port of New Orleans. The complainant class was proposed and defined by plaintiffs in the Pre-Trial Order as:

"(1) All black general longshore workers;

(2) All black longshoremen working in the craft composed of sweepers, coopers, waterboys, and sacksewers;

(3) All black foremen including general long-

> shore workers who obtain work from time to time as non-regular foremen."

Defendants were the New Orleans Steamship Association (hereinafter "NOSSA"), various of its members who employed longshore labor in two riverfront crafts, the International Longshoremen's Association and four I.L.A. local labor unions who represented that labor and bargained on their behalf with NOSSA.

Class claims lodged by the plaintiffs in their pretrial, trial and finally in their posttrial submissions to the District Court included a generalized charge of discrimination in the assignment of " . . .preferred or higher paying work". Counsel for plaintiff in his opening statement noted:

> "We allege, and we intend to prove that certain companies discriminate against Black longshoremen by completely excluding them from certain preferential higher-paying work . . .one clear example of this is the carpentry work . . .Another *example* is the so-called grain gangs. (Emphasis supplied) (T-20)

Trial began in July and concluded September 20, 1974. At trial the plaintiffs sought to prove their charges on assignment of "preferred" longshore work through testimony and the introduction of exhibits. The trial court did not at any time, by any ruling or otherwise, prevent plaintiffs from trying to prove discrimination in assignment to longshore grain work, or to any other kind of "preferred" longshore work standing alone.[1] No witness, however, testified that he had been denied longshore work in grain. Furthermore, plaintiffs' exhibits on earnings by the class at individual defendant companies did not separate earnings while working in grain from earnings resulting from all other types of longshore work.

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[1] Comment by the Court of Appeals on rehearing, pg. 3-F, (Appendix F) notwithstanding.

Finally in plaintiffs' Proposed Findings of Fact and Conclusions of Law after trial, they asked the Court to rule in their favor on a class claim described as "Racial Discrimination in Preferred Work Assignments." Under that heading plaintiffs grouped assignments of longshoremen to grain work, carpentry work, LASH/SEABEE gangs and deck jobs in integrated general cargo gangs.

In fact, all parties to the litigation, and the District Judge, addressed the subject of preferential longshore employment opportunities as a whole, without focusing upon or distinguishing one type of such work to the exclusion of another type of such work, in recognition of the unusual mobility of individual longshoremen between employers and also between different types of longshore work. This mobility was established through testimony that (1) longshoremen are hired anew each day (T-334); (2) longshoremen need not work if they choose otherwise (T-824-5, 2058-9, etc.); and (3) longshoremen are able to choose what company and type of cargo they will work (T-340, 502, 1826), without the impediment of ordinary seniority restrictions (T-1441).

On February 14, 1979 the trial court entered its decision in favor of the defendant employers with respect to every claim by the plaintiffs. In particular, the District Court:

(1) found no discrimination in preferred work assignments as alleged by the plaintiffs, stating that "...there are too many variables in the longshore industry..." to find a "...broad pattern or practice of racial discrimination..." in preferred work assignments, citing as one factual underpinning for this conclusion:

> "...the nature of the work, in that individual employees are not compelled to work every day and many can earn a decent living by working premium hours only when they want to; [and that] ...those who do work regularly can achieve maximum earnings and work hours by a willing-

ness to work additional hours to earn premium pay; . . ." (Appendix A, pg. 28-A).

(2) vacated its earlier ruling on a Port-wide class of black longshoremen, finding that the class as defined by the plaintiffs (once persons having antagonistic interests were excluded) lacked the requisite numerosity *and* that there had been no proof of discriminatory action " . . .applicable to a specific group of employees similarly situated and generally acted upon by the defendants with respect to an applicable class." 466 F.Supp. 662, 672.

On June 4, 1979 plaintiffs filed a Motion for Reconsideration of the Grain Cargo Issue. This marked the first time that the plaintiffs separated a claim of discrimination in assignment to grain gangs from their general claim of discrimination in "Preferred Work Assignments." This Motion also found plaintiffs asking for a class different from that of "all black general longshore workers" which class they had been insisting upon and representing for the preceding eight years. Following briefing and oral argument the District Court issued an order dated June 30, 1980, denying plaintiffs late attempt to prove discrimination in this one segment of all longshore employment opportunities available to black longshoremen. The Court affirmed its earlier factual finding that the nature of longshore employment precluded segmentation:

"[Plaintiffs] conclude that because premiums of up to 40 cents an hour are paid for grain cargo work [In our decision, see p. 673, we found a 20 cent per hour premium for such work.], this clearly establishes economic loss to blacks as a result of the allocation on racial lines, regardless of the availability of longshore work at *regular rates*. However, this ignores the fact that there are premium rates for other types of work besides that for grain cargo. This includes special kinds of work, such as, meal-time, night work, weekends, damaged cargo, explosives, etc. And, as pointed out by the

> defendants, by not including them in the statistical picture, the possibility of an inaccurate distortion exists. We agree with defendants that plaintiffs were unable to show that the overall work allocation in the longshore industry was disproportionate or inequitable and we think that such a showing is crucial to prove racial discrimination. *No longshoreman works exclusively at one type of work. Since he may work various types of cargo at different hours in any given week, the important thing is how he fares overall.* . . .There is no indication that the grain clause and the 20 cent differential created an overall discriminatory effect on the amount of money earned by black longshoremen. We think that the evidence as a whole established that blacks in the longshore industry receive their proportionate share of work and pay according to their numbers." (Emphasis added) (Minute Entry dated June 30, 1980, Appendix B, pg. 4-B)

Judgment was entered by the District Court dismissing the action on the merits as to all defendants, except for ordering two mergers among the four defendant local I.L.A. unions. Plaintiffs filed a timely appeal on only a portion of one of the six class claims decided against them and in favor of the defendants.[2] The defendant I.L.A. labor unions did not appeal from the merger order.

On April 9, 1982 the Court of Appeals affirmed the District Court's ruling on one of the newly separated issues, i.e., assignment to deck jobs in integrated general cargo gangs, and reversed the District Court's ruling on the other separated issue, i.e., assignment of longshoremen to grain work. The Court of Appeals concluded that the District Court had not made a factual determination as to the distinctiveness or separ-

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[2] Plaintiffs appealed part of their "Preferred Work Assignments" claim, i.e., assignment to deck jobs in integrated general cargo gangs and assignment to grain work. There was no appeal from other parts of the "Preferred Work Assignments" claim.

ability of longshore work in grain. Without citation to the record, the Court of Appeals states that the District Court had presumed there was no distinctiveness, thereby precluding plaintiffs from adducing proof of discrimination in that part of preferred work and "transforming" plaintiffs' claim into an industry-wide claim. This latter action, as perceived by the Court of Appeals, was characterized as "legal" in nature by that same Court. Based on this characterization, the Court of Appeals then reviewed the District Court's decision without regard to the "clearly erroneous" standard, (1) reversed, (2) certified a class of black longshoremen eligible for grain work represented by unnamed longshoremen not parties to the lawsuit, and (3) entered a finding of "purposeful discrimination" on the assignment of grain work, directing the District Court on remand to "determine the appropriate relief."

Defendants protested the standard of review used by the Fifth Circuit, and its failure to remand, by filing a Petition for Rehearing and Suggestion of En Banc Consideration on Rehearing on May 28, 1982, citing the Court of Appeals to several misapprehensions and calling the Court's attention to the intervening decision of the Supreme Court of the United States in *Pullman-Standard, Inc. v. Swint,* 102 S.Ct. 1781 (1982). Over four months later the Court of Appeals issued a written opinion denying said Petition and Suggestion. (Appendix F).

Facts Material to the Questions Presented

The workplace of this employment discrimination suit includes the entire riverfront of the Port of New Orleans (the largest port, by tonnage, in the United States), which encompasses longshore facilities on the Mississippi River from the Gulf of Mexico upriver to the Port of Baton Rouge (Ascension-St. James Parish line). This is the geographical scope of collective bargaining agreements negotiated between NOSSA, acting on behalf of certain of its members, and the defendant I.L.A. local unions herein. The original employer defendants were thirty-one of NOSSA's sixty-three

members and associated companies, a major part, by both employment and payroll, of the maritime industry, the largest industry in the City of New Orleans.

This suit in its original form attacked employment practices within two I.L.A. crafts, i.e., the General Longshore Workers ("longshoremen") and the Sacksewers, Sweepers, Waterboys and Coopers ("waterboys"), under two collective bargaining agreements, and employment practices beyond those crafts (e.g., promotions into supervision). All of these charges over the past eleven years have been decided in favor of the employer defendants, save a portion of one such charge, assignment of longshoremen to work grain. This statement of material facts will focus on that subject.

Because of the large costs associated with idle seagoing vessels, stevedores (the primary employers of longshoremen) operate around-the-clock, seven days a week. Longshore gangs[3] are "shaped" (i.e. hired and formed) twice daily, at 7:00 a.m. and again at 4:30 p.m., the gangs being hired anew each day. However, the business that a stevedore may have on a given day or week fluctuates with the arrival and departure of ships. This is one reason why individual longshoremen work for many different stevedore employers, in many different kinds of longshore jobs, in the course of a year. This fluctuation and variation of available longshore work [e.g., from highly merchanized LASH (Lighter Aboard Ship) cargo to bagged goods; from heavy lift to bulk, etc.] is matched by an extraordinary variety in pay rates (e.g., straight time, double time meal hours, time and a half overtime for work on weekends or work at night, premiums for certain types of cargo, etc.).

Perhaps in part because of the variety in compen-

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[3] The most common longshore gang, a gang used to work general cargo was composed of sixteen longshoremen. Gangs used to work grain were composed of eight longshoremen. Gangs used on LASH/SEABEE vessels had thirty-six longshoremen. Gangs used for carpentry varied in size under the labor agreement. Gangs handling ore or rocks had six longshoremen per gang. Gangs handling heavy lifts employed twelve longshoremen. [NOSSA Ex. No. 12 (d)]

sation and available work, there is a striking absence of traditional employment ties between the individual longshoreman and the employing stevedore. Briefly stated, there is no rule forcing an individual longshoreman to work at any particular time, during any particular week, on any particular job or for any particular employer. This fact was repeated, over and over, at trial by witnesses for both the plaintiffs and the defendants:

> "This is a very casual industry, and these guys have got the flexibility, really, if they are going to work on a particular day; and if they decide they are going to work, who they are going to work for, and what they are going to do." Testimony of C. Hayden (T-1826)

> "Q: As a regular, you have a right to work in the gang?
> A: Right.
> Q: On the other hand you don't have any obligation to work tomorrow for some reason?
> A: Yes."
> Testimony of M. Richard (T-336)

This fact was adopted by counsel for plaintiffs:

> " . . .the longshore industry in this case is unique, . . .on Title VII cases, because each individual person really has a choice, to some extent, about whether he is going to work on a particular day." Statement of R. Seymour (T-2841)

This fact was expressly recognized by the District Court:

> "No longshoreman works exclusively at one type of work. . . .he may work various types of cargo at different hours in any given week . . ." (Appendix B, pg. 4-B)

A relative degree of stabilization within the framework of casual employment, has been achieved

by the registration of veteran longshoremen as "G" longshoremen under the NOSSA-I.L.A. longshore Deep Sea Agreements.[4] This registration evolved to the point where in contract year 1972-73 (i.e., October 1 through September 30) registered longshoremen worked 98.68% of all longshore hours. The racial profile of longshoremen registered as "G" men in 1973 and 1974 showed a predominate black 3:1 ratio, (Pre-Trial Order A-28).[5] All parties at trial agreed that the relevant labor market for class purposes, when litigating employment opportunities across the riverfront, would be the registered work force.

The value of registration lies in the priority for available work. "G" men were, and are, given first preference for all available work, i.e., filling openings[6] in longshore gangs regardless of the type of work to be performed. Note however that registration does not require that an individual report for work with regularity. The individual's preference as to particular kinds of work, as admitted by plaintiffs' own witnesses (R-340, 502), continues to govern. Many longshore gangs have been designated by stevedores as "regular gangs". Stevedores promote versatility by such gangs, as noted in their cumulative testimony at trial, e.g.,

> "In my company right now I have five house gangs that are qualified to work any type cargo, and one is equal to the other." Testimony of R. Doll, New Orleans Stevedoring Company. (T-2128)

Only "G" registered longshoremen under the Deep Sea

[4] "G" longshoremen are guaranteed an individual minimum annual compensation, provided they accept any and all available longshore work, i.e., general cargo, LASH/SEABEE, bulk, grain, carpentry, etc.

[5] In considering this top-heavy black ratio it is not amiss to remember the relevant labor market from which these employees were drawn, i.e., the New Orleans urbanized area, which in 1970 had a racial population of 67.6% white persons and 32.4% non-white persons.

[6] Because as noted *supra* there is nothing to compel attendance by gang members, daily absenteeism and gang openings are a common occurrence on the riverfront. NOSSA Ex. 92 to 92-134.

Agreement may be selected by the foreman to work in regular gangs.[7] But while a foreman must include a regular gang member in the regular gang if the gang member makes himself available, the gang member has no obligation to appear and work every time his regular gang is ordered out by a stevedore. In fact, there are strong incentives for an individual longshoreman to choose to work only in certain time periods, as opposed to others, i.e., the liberal overtime rules governing employment of longshore labor under the NOSSA-I.L.A. collective bargaining agreement referred to *supra*. Those overtime rules provide that pay at time and a half will be paid to workers for all hours worked between 5:00 p.m. and 8:00 a.m. on any weekday, and for all hours worked on weekends and holidays. Thus, on a typical day there occur many openings that gang foremen must fill. These are filled by hiring other available longshoremen whose gangs are not working, or who choose to work elsewhere that particular day.

As an illustration of the mobility of "G" men under the Agreement: a regular gang member can decline to work at any time with his gang, and choose instead to work in a friend's gang for another stevedore, filling one of the openings caused by other longshoremen doing the same thing, because of personal whim, a desire for overtime earnings or any other reason. The absence of the first gang member, of course, creates an opportunity that will cause yet another absence, etc.

Among the types of longshore work described as "preferential" by plaintiffs is work in grain. Under the Deep Sea Agreements prior to October 1, 1974 assignment of longshoremen to the eight man gangs working grain was to be equally divided so far as "practical" between members of Local No. 1418 (mostly white in membership) and members of Local No. 1419 (mostly black in membership). The clause providing for such division of the work dated from the 1950's and as found

[7] It was proved at trial that the class of black longshoremen held 81% of all regular gang positions (NOSSA Ex. 23) - more than their proportionate share considering the 3:1 black-white ratio among "G" longshoremen.

by the District Court (466 F.Supp. 662, 673) was inserted in the contract(s) at the insistence of the leadership of the black I.L.A. local union because of impending reductions in gang size. The clause was deleted in negotiations that led to the 1974-77 Deep Sea Agreement.

In 1973 there were seventeen regular gangs designated for grain work (eight longshoremen to a gang) working for the defendant stevedores. Work in grain carried a $.20 per hour straight time premium (representing 3% of the regular longshore straight time rate of pay). At trial the President of the predominantly black local union testified that the grain work issue was "a drop in the bucket" (T-1609) when considering the whole of longshore work.

Reasons for Granting the Writ

The Fifth Circuit utilized an improper standard of review, avoiding the "clearly erroneous" test of Rule 52, by plainly mischaracterizing as "legal" the trial court's factual findings that work in grain was not distinctive from other preferred work available to longshoremen, thereby resurrecting in yet another manner the notion of *de novo* appellate review in civil rights litigation contrary to the recent admonitions of this Court in *Pullman-Standard v. Swint,* 102 S.Ct. 1781, (1982), *mutatis mutandis.*

Assuming, as did the Fifth Circuit, that the District Court made an erroneous *"legal"* determination, the Fifth Circuit's reversal of tne District Court without remand for a determination (1) whether work in grain was factually distinctive, and (2) if, assuming distinctiveness, whether there was "purposeful" or intentional discrimination in grain gang employment, is error and is in direct conflict with this Court's holding in *Pullman-Standard, supra.*

Finally the Fifth Circuit in stark conflict with the ruling of *General Tel. Co. v. Falcon, 102 S.Ct. 2364 (1982)* and *East Texas Motor Freight v. Rodriguez,* 431

U.S. 395 (1977) certified a complainant class by determining that unnamed longshoremen, not party to the lawsuit, ..."*can* serve as adequate class representatives...(Emphasis supplied)" *contra*, Rule 23 (a), Fed. R. Civ. P.

I.

THE COURT OF APPEALS AVOIDED REVIEW UNDER THE "CLEARLY ERRONEOUS" STANDARD BY MISCHARACTERIZING AS A LEGAL CONCLUSION THE TRIAL COURT'S FACTUAL DETERMINATION THAT WORK IN GRAIN COULD NOT BE SEGMENTED FROM OTHER PREFERRED LONGSHORE WORK, WHICH DETERMINATION WAS MADE IN CONFORMITY WITH PLAINTIFFS' STRUCTURE OF THEIR CLASS CLAIM TO PREFERRED WORK.

Whether unfettered appellate review of civil rights cases is achieved by the Fifth Circuit through differentiation of facts to be reviewed, i.e. "subsidiary" versus "ultimate",[8] or through blandly characterizing as "legal" what are clearly factual findings, the result *and the error* are the same.

The pivotal ruling in the trial court's decision here was one wherein the District Court accepted the plaintiffs' definition of preferred work as including all longshore work whether in grain, carpentry, LASH/SEABEE or in integrated general cargo gangs (Plaintiffs' and Plaintiff-Intervenors' Proposed Findings of Fact and Conclusions of Law, pg. 9-24). The District Court refused to find on plaintiffs' evidence a "...pattern or practice of racial discrimination..." in "...preferred work assignments, i.e. longshoremen assigned to grain cargo, waterboys for grain cargo crews, carpentry work and assignments to LASH vessels and deck jobs in 'integrated' general cargo crews..." (Appendix A, pg. 28-A). The Court noted as support for its conclusion:

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[8] An approach soundly rejected by this Court in *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982).

"We do not think that the disparities in the statistical analysis presented by the plaintiffs is sufficient to serve as the basis for a conclusion that racial discrimination is being practiced. We think that there are *too many variables* in the longshore industry as constituted in the Port of New Orleans which are not encompassed by statistics. These have been pointed out by the unions as including (1) the nature of the work, in that individual employees are not compelled to work every day and many can earn a decent living by working premium hours only when they want to; (2) even those who do work regularly can achieve maximum earnings and work hours by a willingness to work additional hours to earn premium pay; (3) a certain amount of skill at working certain cargoes or performing certain tasks is subjectively taken into account by superintendents when hiring foremen and their gangs; (4) it is difficult to calculate the effect of the large number of casuals who drift into and out of work on the waterfront on racial distribution of the work."

(Appendix A, pg. 27-28-A) (Emphasis added)

Following this ruling, plaintiffs sought a separate, and post-trial, decision on one part of what they had earlier combined with all "preferred work", i.e., work in grain. By Minute Entry dated June 30, 1980 the District Court reiterated its earlier ruling of no discrimination, affirming its treatment of preferred work as one unitary subject, and making further findings in declining plaintiffs' post-trial plea for segmentation of longshore work opportunities:

"No longshoreman works exclusively at one type of work. Since he may work various types of cargo at different hours in any given week, the important thing is how he fares overall . . .There is no

> indication that the grain clause and the 20 cent differential created an overall discriminatory effect on the amount of money earned by black longshoremen. We think the evidence as a whole established that blacks in the longshore industry receive their proportionate share of work and pay according to their numbers. (Appendix B, pg. 4-B)

In sum, the District Court initially ruled in February of 1979 in favor of defendants on all preferred work taken as a whole, just as that claim was structured by the plaintiffs. Thereafter in June of 1980, on the occasion of plaintiffs' restructuring their claim to preferred work, the Court ruled again, refusing to segment a portion of work available to all longshoremen, because it determined *as a matter of fact* that the extremely casual nature of the employment relationship and the existence of a multiplicity of wage rates made such a segmentation unrealistic and impractical.

The Court of Appeals, after a passing nod to the Fifth Circuit's "ultimate fact" theory of appellate review in civil rights cases (discredited by the Supreme Court three weeks later), proceeded to review the findings of the trial court as though the refusal to segment work in grain was the result of a legal conclusion. This "conclusion" was described in the Court of Appeal's opinion denying rehearing as:

> "...an erroneous view of the law concerning the legal validity of segmented claims."
>
> * * *
>
> "...the decision of the district judge that the law required that the issue of discrimination in grain work not be separately cognizable." (Appendix F, pg. 3-F)

Fortunately, as noted by the Supreme Court almost a hundred years ago, an appellate court's characterization of a trial court's fact finding as a conclusion of law is not binding upon the United States Supreme Court. *Eilers v. Boatmen*, 111 U.S. 356 (1884).

It is impossible to state too strongly how alien this appellate ruling is to the record of the six week trial herein, to the actions of the District Judge, and to the position of the plaintiffs from 1971 to the date that the Fifth Circuit ruled in their favor. With all due respect, it is as though the appellate panel reviewed a record other than the one made by the parties below.

At no time did the plaintiffs seek to introduce evidence or to structure their case on the question of preferred work assignments in any way different from the way that it was presented to the District Court at the close of trial; at no time did the District Court deny the plaintiffs an opportunity to present evidence or argument on the question of preferred work assignments; nor is there any support in the record or in the decision below that the District Judge considered the plaintiffs barred by law from segmenting part of their preferred work assigment claim. To illustrate, plaintiffs listed by name twenty possible witnesses,[9] but chose to call only eleven of its twenty witnesses to the stand during the six week trial. At no time did the District Court stop the plaintiffs from calling those persons, additional witnesses or presenting further evidence on any of their class claims.[10] In fact, plaintiffs, with permission of the Court, called to the stand four witnesses whom they did not list in the Pretrial Order.

The District Court drew proper inferences from documentary evidence and other undisputed evidence. These inferences are properly reviewed only under the "clearly erroneous" standard of Rule 52. *United States v. Gypsum Co.*, 333 U.S. 364 (1948) and *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963).

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[9] One witness, who was not called for unknown reasons, was William Alexander, a person whom plaintiffs claimed would testify as to the "...hiring of grain gangs." The soundest explanation for Alexander's failure to testify is that no one at trial — including the plaintiffs — sought to segment work in grain from other preferred work, or to qualify a subclass of longshoremen working grain.

[10] *Contra* comments by the Court of Appeals in their review. See 673 F.2d 742 at 748 (n.9) (Appendix E), and 688 F.2d 412 at 416 (Appendix F).

In the District Court's trial decision (Appendix A), there was no dispute between the parties or differences in the form of the evidence, as to the nature of the claim presented: i.e., discrimination in assignment of preferred longshore work. The Court ruled on that issue as requested and supported its treatment of the preferred work issue by factual findings on the extremely casual nature of the industry. In the District Court's later ruling on work in grain it affirmed the trial decision, drawing further and specific inferences from fact findings that are a matter of record in the case, e.g. the mobility of class members which renders meaningless evidence as to economic advantages in one part of longshore work.

The Court of Appeals has not reviewed these findings under Rule 52, but rather has engaged in de novo review, thereby ruling in contradiction to Supreme Court precedent as found in *Gypsum Co.*, and *Singer, supra,* and in violation of the sense of the Supreme Court's recent decision on *Pullman-Standard, supra.* Reversal on this ground alone is required.

II.

THE COURT OF APPEALS FOLLOWING REVERSAL FOR LEGAL ERROR, REFUSED TO REMAND FOR FACT FINDING ON THE DISTINCTIVENESS OF WORK IN GRAIN AND TO REMAND FOR FINDINGS ON DISCRIMINATORY INTENT, ENGAGING IN INDEPENDENT FACT FINDING ON THESE SUBJECTS, CONTRARY TO "THE USUAL RULE" AND TO *PULLMAN-STANDARD V. SWINT,* 102 S.Ct. 1781 (1982).

Reversal of the District Court under the guise of legal error is but one half of the Court of Appeals' error in this case. The other half rises from its usurpation of the fact-finder function by determining on appeal two important facts necessary to the plaintiffs' case.

The first such fact the appellate court determined

was that longshore work in grain was sufficiently distinct to permit segmentation or separate treatment. Such a finding is clearly factual as admitted by the Court:

> "Petitioners contend that the inquiry into whether a job category constitutes an entity with distinct and separate characteristics is a question of fact. We are in full agreement with this assertion." (Appendix F, pg. 4-F)

The Court goes on to state that the trial court made no findings on this question, clearing the way for disregard of Rule 52:

> "The district court never addressed the issue of whether grain work was factually a distinct and separate category." (Appendix F, pg. 3-F)

Assuming for purposes of argument that this is correct, a remand would ordinarily be directed for findings on the distinctiveness of longshore work in grain. This is *exactly* what the Supreme Court noted in *Pullman-Standard, supra.*

> "When an appellate court discerns that a district court *has failed to make a finding* because of an erroneous view of the law, *the usual rule* is that there should be a remand for further proceedings to permit the trial court to make the missing findings:
>
> > 'Fact finding is the basic responsibility of district courts, rather than appellate courts, and . . .the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.' *DeMarco v. United States*, 415 U.S. 449, 450 (1974)."
>
> *Pullman-Standard, supra,* at 1791 (Emphasis added)

But the Court of Appeals does not mention this avenue, and rather sub silentio proceeds to decide that

work in grain is sufficiently distinct to justify separate analysis under Title VII.

> "The tasks performed by grain workers differ from those performed by other longshoremen because of the nature of the cargo involved. Furthermore, the Locals and NOSSA traditionally have treated grain work separately from other types of longshore work, as evidenced by the Deep Sea Agreement. The hourly wage paid for grain work is negotiated separately from other types of work. The mode of allocating jobs evenly between the black and white Locals was also unique to grain work. Thus, while longshoremen can and do perform a variety of jobs, the distinctiveness of grain work makes plaintiffs' claim of discrimination in this one area of employment viable under Title VII and § 1981." (Appendix E, pg. 8-E)

There is no support cited by the appellate court for their conclusions that "tasks performed by grain workers differ," or that there has been a traditional separate treatment of grain work in the Deep Sea Agreement, or that the "hourly wage paid for grain work is negotiated separately," or that job allocations in grain were unique. There is no indication that the panel knew, or took into consideration, such things as the similarity of longshore tasks when working bulk cargo and grain, the payment of premiums for working cargoes other than grain, the allocation of gang positions in other longshore work, etc. The weakness of the Court of Appeals' fact finding on this crucial point is *exactly* the reason that remands are "the usual rule." *Pullman-Standard, supra,* at 1791. 5A J. Moore & J. Lucas, *Moore's Federal Pracatice* § 52.06[2] (1982).

Here the Court of Appeals unmistakably concluded what the Supreme Court specifically postulated to be grounds for remand, i.e., that the "...district court has failed to make a finding because of an erroneous view of the law...". It is grave error for the

Court of Appeals to then try, on a cold and extremely voluminous record, to make the alleged missing finding. This Court of Appeals has in similar civil rights litigation followed the "usual rule" and directed remand so that the trial court might find the facts specially . . ." and thereby satisfy Rule 52(a).*Corder v. Kirksey,* 585 F.2d 708 (5th Cir. 1978) and *Echols v. Sullivan,* 521 F.2d 206 (5th Cir. 1975). There is no reason for the Court of Appeals' apparent departure from its earlier precedent and the recent ruling of this Court on this subject in *Pullman-Standard, supra.* In fact there is a dramatic reason for remand on the question of segmentation of work opportunities in grain. The Court of Appeals chastised the District Court for "misconstruing" plaintiffs' allegations (p. 746), "transforming" plaintiffs' claim on work in grain (p. 746) and for "ignoring plaintiffs' claim and creating one of its own (p. 749, n.9)." This legal error, according to the Court of Appeals, resulted in trial of a claim of industry-wide discrimination. It follows that if the Court of Appeals is correct, then the evidentiary record below would not be adequate or complete on the question of the distinctiveness, or nondistinctiveness, of work in grain. After all, the Court of Appeals divined that the trial court has " . . .converted the [plaintiffs'] claim [on grain work] into one of industry-wide discrimination . . ." and further that the trial court then "never addressed" the factual question of segmentation. Having arrived at such a conclusion, it is blatantly inconsistent for the Court of Appeals to deny remand so that further evidence may be taken and specific fact findings entered on the question of segmentation.

In addition to the threshold factual determination on whether work in grain can be segmented, there is the second essential fact finding in these proceedings, i.e., discriminatory intent. The Court of Appeals also decided this question without remand.

Plaintiffs' suit charges unlawful employment practices under § 703(a) of the Civil Rights Act of 1964 and § 1 of the Civil Rights Act of 1866. On the issue of

preferred work, plaintiffs claim a violation through class-wide disparate treatment. To prove a prima facie case of illegal "disparate treatment" this Court has consistently required proof of "discriminatory motive" or intent, noting that such proof is "critical." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The question of "discriminatory motive" or intent under the Civil Rights Act is clearly a factual question.

> ". . .whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a pure question of fact, subject to Rule 52's clearly erroneous standard.
>
> * * *
>
> Treating issues of intent as factual matters for the trier of fact is commonplace."
>
> *Pullman-Standard, supra*, at 1789, 1790

The Court of Appeals here answered this "pure question of fact" in favor of plaintiffs, determining that on the record before it, "discriminatory intent" existed in assignment of work in grain. The Court relied upon certain statistical evidence and a contract clause dividing the work between two local I.L.A. Unions as support for its finding of "intent." (pg. 750) The Court denied a subsequent request for remand by concluding in its decision on NOSSA's Petition for Rehearing ". . .-there was only one possible resolution of the issue. . .[and] remand on that issue would be a waste of time (Appendix F, pg. 7-F)." The latter reference is to a portion of the *Pullman-Standard* decision wherein it was stated:

> "Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard, supra*, at 1791

But here the District Court did not make (or refuse to make) a finding on "discriminatory intent" because of an "erroneous view of the law." The legal error, according to the Court of Appeals, was in the District Court's refusal to allow segmentation of preferred work claims. Under that construction of the case, the District Court obviously never addressed the question of "intent" in assignment of longshoremen to work in grain. There were no findings - "infirm" or otherwise - and accordingly the Court of Appeals should have remanded on the issue of "intent." As noted by the Supreme Court in a case cited with approval in *Pullman-Standard, supra:*

> "...the best course at this point is to require the trier of fact to re-examine the record in light of the proper legal standard."
>
> *Kelly v. So. Pacific Co.*, 419 U.S. 318, 332 (1974)

But even if the District Court had specifically refused to find "intent" in asssignments to grain work because of "an erroneous view of the law," the Court of Appeals could not conclude there was "only one possible resolution of the issue" without ignoring clear Supreme Court precedent. The Court of Appeals in making that assertion did not, and perhaps could not on the record before it, consider all of the factors denoted by this Court as guidance for triers of fact on the question of intent in disparate treatment cases. In *Teamsters, supra,* at 335, n.15, while discussing "intent," the Supreme Court gave as an example its earlier decision in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). That decision refers a trial court that is trying a question of "intent" to such things as (1) proportionate impact of the practice or action, (2) historical background of the decision, (3) departures from normal procedure, and (4) legislative or administrative history. The Court of Appeals in this case looked only to current differential impact. It ignored such critical and relevant factors as the genesis of the practice (e.g., who proposed such a division of

work, and why?) and its evolution over earlier decades (e.g., was the contract clause discussed in subsequent negotiations, and if so, what were those discussions?). The Court of Appeals refused to consider evidence as to how assignment to grain work fit into the overall practices on the riverfront in assigning work to longshoremen, stating in a classic *non sequitur* that if this point was fallacious on the question of segmentation, it was equally unworthy on the factual issue of "intent." Appendix E, pg. 15-E. Considering the few factors analyzed, it is small wonder the Court of Appeals would conclude " . . .there was only one possible resolution." That Court would not have been so categorical if they had followed the guidance of the Supreme Court as set forth in *Arlington Heights* and considered all factors relevant to the issue.[11] If the Court of Appeals had followed that course of analysis, as indeed it should have, then remand for findings in these areas would have been the certain and correct result.

Finally, it is respectfully submitted that the refusal to remand on the question of "intent" is in direct conflict with the holding of the Supreme Court in *Pullman-Standard, supra.* In that case the Court clearly and unequivocally reversed the Fifth Circuit, directing remand for § 703(h) findings based upon the "differential impact" of a seniority system. Here the same Court of Appeals is finding "intent" under § 703(a) based upon differential impact of a collective bargaining agreement clause on assignment of work. The Court of Appeals is the same; the appellate underpinning for a finding of "intent" is the same; the result in this honorable Court should also be the same: reversal and remand.

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[11] It is interesting to note that the Court of Appeals was not quite so categorical in its earlier opinion:

"Because so many of the factors determining work patterns are not within the employer's control, and in fact are determined by the employees, it is more difficult to attribute statistical imbalances to a discriminatory motive on the part of the employers." (Appendix E, pg. 16-E)

In sum, the refusal of the Court of Appeals to remand, opting instead for its own fact finding on the question of job distinctiveness and discriminatory intent, directly conflicts with prior precedent of the Supreme Court, as most recently enunciated in *Pullman-Standard, supra.*

III.

THE COURT OF APPEALS HAS DIRECTED CERTIFICATION OF A CLASS IN WHICH NONE OF THE NAMED PARTY PLAINTIFFS PROVED THAT THEY WERE MEMBERS, OR THAT THEY SHARED THE COMPLAINTS OR INTERESTS OF THE PUTATIVE CLASS MEMBERS, THE COURT RELYING INSTEAD UPON UNNAMED LONGSHOREMEN WHO MIGHT SERVE AS ADEQUATE CLASS REPRESENTATIVES, ALL IN CONTRAVENTION OF RULE 23 FED. R. CIV. P. AND RECENT DECISIONS OF THIS COURT.

The class of complainants in this litigation has been (1) certified, (2) decertified, and (3) recertified during a period of eleven years and in two forums. As noted earlier, the District Court prior to, and during trial, accepted the plaintiffs' argument that they represented under Rule 23(a), *inter alia,* a class of "All black longshore workers . . . ." Following trial and as part of its February 14, 1979 decision on the merits, the District Court reversed its earlier approval of a broad class, deciding that upon the evidence the proposed class of "All black longshore workers" was lacking in the requisite Rule 23(a) (1) "numerosity," and further that there was no proof of action by the defendants directed to a group of employees similarly situated [i.e., Rule 23 (b) (2)].

The Court of Appeals, in reversing the District Court's "legal" error of "converting" the plaintiffs' claim of discrimination in grain work into an industry-wide claim of discrimination, proceeded to certify a

new class of complainants, i.e., all registered black longshoremen who sought or were deterred from seeking grain work. This class is an outgrowth of the Court of Appeals' ruling on discriminatory job assignments to grain work, specifically, assignment of longshoremen to grain trimming gangs and/or hand trimming gangs, as those gangs were structured under Article VIII of the Deep Sea Agreements. These were eight man gangs in which work was to be divided so far as practicable "fifty-fifty" between members of I.L.A. Locals 1418 and 1419.

Defendants argued in support of the District Court's final ruling on the class that there had been no "adequate" representative under Rule 23 of a class of longshoremen looking for work in the eight man grain gangs. The Court of Appeals responded to this point in its first decision by noting:

> "The Pre-Trial Order, however, refutes this contention. At least one of the named plaintiffs claimed to be a victim of each type of discrimination alleged in this appeal." (Appendix E, pg. 24-E, n.20)

The "named plaintiff" alluded to by the Court of Appeals is John Aaron. Aaron, however, specifically disavowed in testimony any connection between his complaint and the eight-man grain gang that is the subject of the Fifth Circuit's remand. (T - 664-5)[12] This fact was called to the attention of the Court of Appeals in defendants' Petition for Rehearing.

The Court of Appeals, in apparent recognition of the weakness of pointing to Aaron as the representative of their new class, sought firmer ground and ended by saying:

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[12] Aaron may in fact have worked grain as one of the types of commodities carried in lighters, but that clearly would have been as a member of a LASH gang, and has nothing to do with work in or assignment to the eight-man gangs assigned to grain work.

> "It must be concluded that, *in a major sense,* the district court by its rulings cut off the development of specific testimony to isolate particular people as having engaged in grain work. The record is quite clear, *by implication however,* and indeed by the very argument which the plaintiffs make in trying to say that grain work is not separable, that many of the longshoremen at the New Orleans port have worked in grain gangs, and *can serve* as adequate class representatives of a class limited to challenging discrimination in grain work." (Appendix F, pg. 6-F) (Emphasis added)

The Court has apparently directed certification of a class for which no representative, adequate or otherwise, has appeared. The Court seems to be saying that since there must be such longshoremen "out there" — somewhere, certification of a class is required.

The Supreme Court has recently emphasized that in private civil rights class actions all of the requirements of Rule 23 must be satisfied. *General Tel. Co. v. Falcon,* 102 S.Ct. 2364 (1982). That case, coincidentally to the one at bar, revolved around the "adequacy of representative" requirement of Rule 23(a). There the Supreme Court reversed a class certification as overly broad, finding the plaintiff was not an "adequate" representative of absent parties whose claims differed from those of the plaintiff.

The decision of the Supreme Court in *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 97 S.Ct. 1891 (1977), quoted with approval in *Falcon, supra,* is even more in point. There the Supreme Court reversed the Fifth Circuit who had certified a class on appeal (as that Court did in the present case), because:

> ". . .the named plaintiffs were not proper class representatives under Fed. Rule Civ. Proc. 23(a). In short the trial court proceedings made clear that Rodriguez, Perez and Herrera were not members of

> the class of discriminatees they purported to represent. As this Court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." p. 403

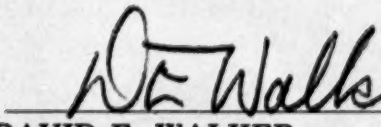
In the present case, the trial court proceedings also make clear that Williams, Hayes, Turner, Richard and Aaron are not members of the class confected by the Court of Appeals. Indeed, the Court of Appeals seems to implicitly acknowledge this in that it rather lamely refers to "many . . .longshoremen" who "can serve" as representatives. If this hypothetical approach to satisfying Rule 23 is allowed to stand, then the requirements of that Rule in civil rights litigation, as envisioned by Congress in its enactment of Title VII and the pronouncements of the Supreme Court most recently in *Falcon* and *East Texas Motor Freight, supra* will have been completely undercut. Because of the aforesaid conflicts with applicable decisions of the Supreme Court, a Writ of Certiorari must and should be granted.

CONCLUSION

A Writ of Certiorari must and should issue to the Court of Appeals for the Fifth Circuit in this case because the decision below reflects a clear and continued intention by that appellate court to serve as the fact finder in civil rights litigation. This is evidenced by the court's pontification on the proper standard of review, their entry of fact findings more properly the subject of remand, and the declaration of a complainant class without regard to the federal Rules. All of these features of the appellate decision taken singly, or as a whole, are at odds with recent and applicable decisions of this honorable Court.

Respectfully submitted this the 4 day of January, 1983.

WALKER & BORDELON

By: 

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